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No. 96-1590

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether respondents had standing to challenge the Federal Election Commission's decision not to bring an enforcement action in this case.

2. Whether an organization that spends more than $1,000 on contributions or coordinated expenditures in a calendar year, but is neither controlled by a candidate nor has its major purpose the nomination or election of candidates, is a "political committee" within the meaning of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-40a) is reported at 101 F.3d 731. The opinion of the court of appeals panel (Pet. App. 41a-74a) is reported at 66 F.3d 348. The opinion of the district court (Pet. App. 77a-93a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 6, 1996. On February 21, 1997, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 7,

1997. The petition for a writ of certiorari was filed on April 7, 1997, and was granted on June 16, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 301(4)(A) of the Federal Election Campaign Act of 1971 (FECA or Act) defines the term "political committee" to include

> any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. 431(4)(A).

STATEMENT

1. This case involves provisions of the Federal Election Campaign Act of 1971 (FECA or Act) governing the activities of a "political committee," defined by the Act to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."

2 U.S.C. 431(4)(A).[1] The FECA requires political committees to satisfy certain organizational requirements. 2 U.S.C. 432. The Act also requires a political committee to register with the Federal Election

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[1] Section 301(8)(A) of the FECA defines "contribution" to include

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. 431(8)(A).

Section 301(9)(A) of the Act defines the term "expenditure" to include

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. 431(9)(A).

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

Commission (FEC or Commission). 2 U.S.C. 433. A political committee is required to make comprehensive public disclosures of all of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v); Pet. App. 3a ("Once designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200."). The FECA provides in addition that no person may make contributions to a political committee which, in the aggregate, exceed $5,000 in a calendar year. 2 U.S.C. 441a(a)(1)(C); see *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253-254 (1986) (*MCFL*) (plurality opinion) (describing requirements applicable to political committees).

Election-related expenditures made by individuals, and by groups that are not political committees, are subject to extensive disclosure requirements. All "persons" (a term that includes any "organization or group of persons," 2 U.S.C. 431(11)) that make independent election expenditures (see 2 U.S.C. 431(17); note 1, *supra*) aggregating more than $250 and are not political committees are required to file disclosure reports with the Commission. 2 U.S.C. 434(c); *MCFL*, 479 U.S. at 252-253 (plurality opinion). In addition, any contributions (including coordinated expenditures) aggregating more than $200 from "persons" to candidates or political committees must be reported by the recipient. 2 U.S.C. 434(b)(3). With respect to reporting requirements, the distinctive consequence of "political committee" status is that such an organization is required to make comprehensive disclosures of *all* of its receipts and

disbursements, whether or not they bear any direct relation to electoral campaigns.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a broad array of issues concerning the construction and constitutionality of the Act. The Court observed:

> The general requirement that "political committees" and candidates disclose their expenditures could raise * * * vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79 (footnotes omitted).

The Court reaffirmed the "major purpose" test for status as a political committee in *MCFL*. A plurality noted that "this Court said [in *Buckley*] that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n.6. And the Court observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be re-

garded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

2. The FEC is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d (a) and (e), 437f, 437g. Congress has authorized the Commission to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h. Congress has thus "vest[ed] in [the FEC] primary and substantial responsibility for administering and enforcing the Act." *Buckley*, 424 U.S. at 109.

The FECA states that "[a]ny person who believes a violation of this Act * * * has occurred, may file a complaint with the Commission." 2 U.S.C. 437g(a)(1). The Act further provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). In such a proceeding, the reviewing court

> may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

2 U.S.C. 437g(a)(8)(C).

3. The American Israel Public Affairs Committee (AIPAC) is an incorporated, tax-exempt organization with approximately 50,000 supporters and a budget of approximately $10 million. Its stated purpose is to maintain and improve friendship and goodwill between the United States and Israel. The organization's activities include lobbying Congress and the Executive Branch for military and economic aid to Israel. Pet. App. 2a-3a. For example, AIPAC's 1989 Policy Statement listed eleven goals for that year, including items such as "promote peace between Israel and its Arab neighbors," and "oppose the sale of sophisticated U.S. arms to Arab countries in a declared state of war with Israel"; none of the 1989 goals mentioned elections or candidates. J.A. 137-138. AIPAC grew out of the work of the American Zionist Council, which in 1954 created a separate full-time lobbying entity called the American Zionist Committee for Public Affairs—renamed AIPAC in 1959. J.A. 120.

Respondents are former ambassadors, Members of Congress, or other government officials. In 1989 they filed an administrative complaint with the Commission, alleging that AIPAC had violated the FECA. Respondents alleged that AIPAC had made campaign contributions and expenditures on behalf of candidates for federal office, in violation of 2 U.S.C. 441b, which prohibits corporations from making such contributions and expenditures except through the establishment of a "separate segregated fund" pursuant to 2 U.S.C. 441b(b)(2)(C). Respondents also alleged that

AIPAC's activities brought it within the statutory definition of "political committee," and that it had failed to comply with the FECA requirements to which political committees are subject. See Pet. App. 3a-4a.[2]

The FEC's General Counsel investigated the allegations. The General Counsel issued a report concluding that

> AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and do[] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

J.A. 146; see J.A. 37-38 ("AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization."); Pet. App. 43a. The General Counsel therefore recommended that the Commission find no probable cause to believe that

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[2] Respondents

> claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates.

Pet. App. 3a-4a.

AIPAC had violated 2 U.S.C. 433 and 434, the organizational and reporting requirements applicable to political committees. J.A. 152, 179. The General Counsel recommended, however, that the Commission find probable cause to believe that AIPAC had violated 2 U.S.C. 441b. J.A. 152, 179.[3]

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[3] The General Counsel concluded that "AIPAC ha[d] made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns." J.A. 37. The General Counsel also concluded that AIPAC had made coordinated expenditures, in violation of 2 U.S.C. 441b, by acting as a contact between its supporters and various candidates or their fundraisers. See J.A. 106-109.

The Court in *MCFL* recognized a narrow, constitutionally based exception to Section 441b's ban on corporate campaign expenditures. The Court noted that MCFL (1) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 264. Because those features "essential to [the Court's] holding" obviated the concerns underlying Section 441b, the Court concluded that corporations with those three features "may not constitutionally be bound by § 441b's restriction on independent spending." *Id.* at 263-264. Compare *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 662 (1990) ("Because the Chamber does not share these crucial features, the Constitution does not require that it be exempted" from a comparable state ban on corporate campaign expenditures).

In the instant case, the FEC's General Counsel concluded that AIPAC does not fall within the *MCFL* exception to Section 441b because AIPAC has accepted contributions from business corporations. J.A. 150-152. In any event, the *MCFL* exception applies only to independent expenditures. See 479

Consistent with the recommendation of the General Counsel, the Commission unanimously found no probable cause to believe that AIPAC had violated Sections 433 and 434. Pet. App. 95a.[4] The Commission found probable cause to believe that AIPAC had violated Section 441b. *Ibid.* The FEC voted, however, to take no action regarding that determination, *ibid*, explaining that "the Commission should clarify its membership definition before imposing penalties in close cases such as this," *id.* at 98a.[5]

U.S. at 259-260, 263. AIPAC would therefore be prohibited from making direct or in-kind contributions (except through a separate segregated fund) even if it satisfied the criteria set forth in *MCFL*.

[4] Absent some affirmative contrary indication, the General Counsel's report is presumed to set forth the Commission's rationale for action consistent with the General Counsel's recommendation. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 38 & n.19 (1981); *National Rifle Ass'n* v. *FEC*, 854 F.2d 1330, 1337 n.7 (D.C. Cir. 1988); *Carter/Mondale Presidential Committee, Inc.* v. *FEC*, 775 F.2d 1182, 1186-1187 & n.2 (D.C. Cir. 1985).

[5] AIPAC contended that the alleged contributions in this case involved communications to AIPAC's own members and were therefore exempt from Section 441b's prohibition on corporate campaign contributions and expenditures. The FECA's definition of "expenditure" generally excludes "any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel." 2 U.S.C. 431(9)(B)(iii); see also 11 C.F.R. 100.8(b)(4), 114.3(a)(2). Consistent with the General Counsel's recommendation, a majority of the Commission concluded that "AIPAC did not meet the Commission's membership criteria," and therefore found probable cause to believe that AIPAC had violated Section 441b. Pet. App. 98a. The Commission also concluded, however, that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the

4. Respondents filed suit in federal district court. They challenged the FEC's determination that there was no probable cause to believe that AIPAC was a "political committee" within the meaning of the Act; they did not contest the Commission's decision to take no action with respect to AIPAC's alleged violation of Section 441b. See J.A. 9-26. Respondents alleged that they "are politically active persons who * * * oppose AIPAC views on U.S. foreign policy in the Middle East." J.A. 11. Respondents further alleged that they "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public," and that the Commission's dismissal of their administrative complaint "has given AIPAC an illegal advantage in this competition." *Ibid.*

The district court granted summary judgment for the Commission. The court concluded that "the Commission interpreted properly the statutory definition of 'political committee' and the 'major purpose' test." Pet. App. 92a. The court also determined that "the Commission's application of the major purpose test to the facts presented * * * regarding AIPAC's campaign-related activities was reasonable." *Ibid.*

5. A divided panel of the court of appeals affirmed. Pet. App. 41a-74a. The panel first held that respondents had standing to bring their suit. Relying on circuit precedent, the panel held that respondents' asserted "informational injur[y]"—*i.e.*, respondents'

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organization came close to meeting the 'spirit' of the Commission's membership criteria, but failed on a specific point." *Ibid.* The Commission therefore "decided to exercise [its] prosecutorial discretion, * * * and to take no further action with respect to the finding on Section 441b." *Ibid.*

contention that "their ability to influence and inform policymakers and the public is impaired by the lack of information about AIPAC's contributors and expenditures," *id.* at 45a—was sufficient to meet the requirements of Article III. *Id.* at 45a-46a. The court also concluded that, "[b]ecause [respondents] allege that they are voters and persons who seek to communicate to policymakers and the public about AIPAC's campaign contributions, their interest in information about campaign contributions falls within the 'zone of interests' intended to be served by the statute." *Id.* at 47a.

On the merits, the panel concluded that this Court's decisions in *Buckley* and *MCFL* furnished a reasonable basis for the Commission's application of the "major purpose" test. The panel explained:

> Although *Buckley* and [*MCFL*] concern expenditures under the Act, the Court's rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions. A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It is our duty in the interpretation of a federal statute to avoid serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47 (1953).

Pet. App. 55a-56a (parallel citations omitted). The panel concluded that "[b]ecause a judicial gloss on the statute has limited the application of FECA's restrictions for political committees to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major purpose test was not contrary to law." *Id.* at 56a.[6]

Judge Silberman filed an opinion concurring in part and dissenting in part. Pet. App. 58a-74a. Relying on respondents' "assert[ion] that they compete with AIPAC in lobbying Congress and seeking to persuade the American people on their views of American interests regarding Arab-Israeli disputes," Judge Silberman viewed the suit as "akin to one brought by an economic competitor" and concluded that respondents satisfied the requirements of Article III. *Id.* at 58a-59a. On the merits, Judge Silberman acknowledged that "there is language in *Buckley* and *MCFL* that can literally be read to support the FEC's position." *Id.* at 68a. He concluded, however, that the "major purpose" test could not properly be applied to an organization that had made *contributions* (as opposed to independent expenditures) in excess of Section 431(4)(A)'s $1,000 limit. *Id.* at 73a. Judge Silberman asserted that any such organization would be subject to the statutory requirements applicable to political committees, without regard to the organization's major purpose. *Ibid.*

6. The court of appeals vacated the panel decision and granted rehearing en banc. Pet. App. 75a-76a. The en banc court of appeals subsequently reversed the judgment of the district court. *Id.* at 1a-40a.

a. The court of appeals first concluded that respondents had standing as voters because "[t]hey have

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[6] The panel also upheld, as reasonable, the Commission's determination that campaign-related activities were not a major purpose of AIPAC. Pet. App. 57a-58a.

been deprived of certain specific information that Congress thought voters needed to make an informed choice and therefore required 'political committees,' *inter alia*, to disclose." Pet. App. 8a. The court explained that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids are due, would suffer a particularized injury even if all other bidders also suffered an injury." *Id.* at 12a. Because it concluded that respondents "have standing as affected voters," it declined to "resolve whether [respondents] also have standing as political competitors of AIPAC, or whether [respondent] Findley—who was last a candidate in 1982—has standing as a candidate." *Id.* at 13a (citation omitted).

The court also rejected the FEC's argument that respondents' claim was not redressable because the Commission possesses enforcement discretion and might decline to compel disclosure by AIPAC. The court explained that "it has always been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning." Pet. App. 15a. The court of appeals also noted that respondents would be authorized by the FECA to bring suit against AIPAC if the Commission failed to "conform" to the court's "declaration." *Ibid.* (quoting 2 U.S.C. 437g(a)(8)(C)). The court stated that "[i]t would appear under [Section 437g(a)(8)(C)] that if the Commission gave only lip service to compliance with [the court's] order and settled with AIPAC without requiring disclosure,

* * * [respondents] would be able to seek disclosure directly." *Ibid.*

b. On the merits, the court of appeals concluded that AIPAC was a "political committee" within the meaning of the FECA. The court rejected the Commission's argument that the FEC's contrary conclusion was entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Because the controversy involved the proper construction of this Court's opinions in *Buckley* and *MCFL*, the court concluded, deference was inappropriate. Pet. App. 19a-20a.

Addressing the interpretive issue "*de novo*," the court of appeals framed the "key question" as "whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated." Pet. App. 20a. The court acknowledged that "language in *Buckley* and *MCFL* can literally be read to support the FEC's position." *Id.* at 21a. The court reasoned, however, that "both cases focused on the constitutional concerns raised by independent expenditures * * * as distinguished from coordinated expenditures or direct contributions." *Ibid.* The court noted that "[i]ndependent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption." *Ibid.* It concluded that the *Buckley* Court "clearly distinguished independent expenditures and contributions as to their constitutional significance, and its references to a 'major purpose' test seem to implicate only the former." *Id.*

at 24a. The court of appeals read the *MCFL* opinion in a similar fashion. *Id.* at 24a-25a.

The court of appeals also suggested an alternative basis for its conclusion that AIPAC was a political committee. Respondents "argue[d] that the major purpose test is properly employed to determine whether an organization's independent disbursements constitute 'expenditures' within the meaning of § 431(9)(A)(i), such that they count toward the $1,000 limit defining political committee status." Pet. App. 26a n.11. On respondents' view of the statute, any organization making expenditures (defined as disbursements whose major purpose is to influence federal elections) aggregating more than $1,000 per year is a political committee, regardless of the major purpose of the organization as a whole. The court of appeals, while declining "to determine finally whether [respondents'] version of the test is the only possible one," *ibid.*, construed prior case law to support that approach. See *id.* at 26a (D.C. Circuit precedent "indicates that, as [respondents] contend, it is the purpose of the organization's disbursements, not of the organization itself, that is relevant").

The court of appeals also believed that the Commission's approach would have untoward practical consequences. Thus, the court stated:

> The FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.

Pet. App. 27a. In the court's view, that approach "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee.'" *Ibid.*

The court concluded:

> There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of [respondents'] complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further action not inconsistent with this opinion.

Pet. App. 29a.

c. Judge Sentelle, joined by Judge Henderson, dissented. Pet. App. 30a-40a. The dissenting judges concluded that respondents asserted only a "generalized grievance"—"a diffuse rather than a particularized injury"—and therefore lacked standing under Article III. *Id.* at 32a-33a. They explained that respondents "have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible." *Id.* at 38a. The dissenting judges also concluded that

any injury respondents might have suffered was not redressable by a judicial order. They explained that respondents' "claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information [respondents] seek, that AIPAC will comply with that order, and that [respondents] will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information." *Id.* at 40a. In the view of the dissenting judges, that chain of inferences was "too attenuated to provide the sort of redressability necessary to meet Article III standing." *Ibid.*

SUMMARY OF ARGUMENT

1. A. Respondents' complaint alleged that they oppose AIPAC's views concerning U.S. foreign policy, and that the Commission's decision not to undertake an enforcement action has given AIPAC an unlawful advantage in a "competition" to influence public and governmental opinion. That allegation is insufficient to establish that respondents possess the requisite *personal* stake in the litigation. In any event, respondents' alleged competitive injury does not fall within the zone of interests protected by the FECA generally or the Act's political committee provisions in particular.

B. Respondents' alternative interest as voters is insufficiently particularized to provide a basis for their suit. The theory articulated by the court of appeals—that respondents have standing because they vote in elections in which AIPAC may have made contributions—would apply equally to all registered voters in the United States. Respondents' alleged injury is a "generalized grievance" rather than the

particularized harm required to establish standing under Article III. Even if that injury were sufficient to satisfy constitutional requirements, moreover, this suit should not go forward. In light of the background rule that the government's decision not to take an enforcement action against a third party is ordinarily not reviewable at all, Section 437g(a)(8)(A) should not be construed so broadly as to encompass a "grievance" that is shared by the entire electorate.

C. Respondents' asserted injuries are not likely to be redressed by a favorable judicial ruling. The Commission is not required to institute an enforcement action in every case in which it believes a violation has occurred. AIPAC consistently has argued that it is not a political committee even under respondents' proposed construction of the Act, and its view might prevail in court should an enforcement action go forward. It is also quite possible that a court would impose, or the Commission would negotiate, a remedy that did not include the disclosures sought by respondents.

2. A. The Commission did not act in a manner "contrary to law" in finding no probable cause to believe that AIPAC had violated 2 U.S.C. 433 and 434. Under this Court's precedents, the FECA's political committee provisions apply only to organizations that are controlled by a candidate or whose major purpose is campaign-related activity. The Court first announced that construction of the Act in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and reaffirmed that approach in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*).

B. Consistent with this Court's decisions in *Buckley* and *MCFL*, the FEC determined that campaign-related activity was not AIPAC's major purpose and

that the organization therefore was not a political committee. The court of appeals overturned that finding, suggesting two alternative bases for its conclusion that AIPAC should be treated as a political committee. Neither of those theories is consistent with this Court's precedents.

i. The court of appeals suggested that the "major purpose" test might appropriately be used to determine whether a particular disbursement is an "expenditure" counting towards the $1,000 statutory threshold. On that theory, an organization that makes campaign expenditures (defined as disbursements whose major purpose is to influence federal elections) aggregating more than $1,000 per year is, *ipso facto*, a political committee, regardless of the major purpose of the organization as a whole. As articulated in *Buckley* and *MCFL*, however, the "major purpose" test focuses unambiguously on the purpose of the organization, not on the purpose of a particular disbursement. That is particularly clear from *MCFL*, which held that an organization making nearly $10,000 in campaign-related expenditures was not a political committee because its central organizational purpose was issue advocacy.

ii. The court of appeals also concluded that the practical and constitutional concerns underlying the "major purpose" test are implicated only when the disbursements that exceed the statutory threshold are independent expenditures, and are inapplicable to an organization that makes more than $1,000 per year in direct contributions or coordinated expenditures. That conclusion was incorrect. With respect to reporting requirements, the distinctive consequence of political committee status is that an organization is required to disclose all of its receipts and disbursements, even those that have no direct relation to electoral activity. The limiting construction given to the statutory term "political committee" in *Buckley* serves to address the danger that small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. That danger is equally present whether the triggering disbursements are independent expenditures or direct contributions.

C. Thus, the "major purpose" test responds to the concern that the FECA's disclosure requirements might unnecessarily burden the non-campaign-related speech of an organization that only occasionally makes election expenditures. Contrary to the court of appeals' conclusion, application of the "political committee" provisions to groups that only occasionally engage in campaign activity is unnecessary to ensure that significant contributions and independent expenditures are exposed to public view. AIPAC's campaign-related activity will be subject to reporting requirements even if it is not a political committee. To require groups that are minimally involved in campaign-related activity to report *all* of their receipts and disbursements is unnecessary to effectuate the purposes of the Act.

ARGUMENT

I. RESPONDENTS LACK STANDING TO BRING THIS SUIT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately re-

solved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, 117 S. Ct. 1154, 1161 (1997). See also, *e.g.*, *Raines* v. *Byrd*, 117 S. Ct. 2312, 2317-2318 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). As we explain below, respondents cannot meet those requirements.

Even if a plaintiff satisfies the requirements of Article III, moreover, it does not follow that his suit can go forward. "Congress legislates against the background of [this Court's] prudential standing doctrine, which applies unless it is expressly negated." *Bennett*, 117 S. Ct. at 1162. In the instant case, respondents' suit rests on 2 U.S.C. 437g(a)(8)(A), which provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

For two reasons, Section 437(g)(a)(8)(A) should be given a narrow construction.

First, Section 437g(a)(8)(A) applies in an area—the decision by a government agency not to undertake an enforcement action against a private party—that is typically not subject to judicial review at all. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 616-619 (1973). Second, the statutory review provision under which respondents' action was brought is narrower than that in the Administrative Procedure Act (APA), which authorizes suits by persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. The FECA does not authorize suits by persons "adversely affected," but only by persons "aggrieved" by the FEC's dismissal of a complaint that they have filed with the Commission. 2 U.S.C. 437g(a)(8)(A); cf. *Liquid Carbonic Indus. Corp.* v. *FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (Federal Power Act provision authorizing judicial review for "[a]ny party * * * aggrieved" is narrower than APA's judicial review provision).[7]

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[7] This Court's "decisions interpreting the Freedom of Information Act [FOIA] have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 449 (1989). Contrary to respondents' contention (see Br. in Opp. 15), however, their suit is not properly analogized to one brought under the FOIA.

First, the gravamen of an FOIA action is that a government agency has breached its legal duty to disclose to the plaintiff

A. Respondents' Asserted Injury As "Comptitors" Of AIPAC Does Not Satisfy Article III And Is Not Within The Zone Of Interests Protected By The FECA

In their complaint, respondents broadly alleged that they "are politically active persons who * * * oppose AIPAC views on U.S. foreign policy in the Middle East"; that they "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public"; and

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information actually in the government's possession. Respondents, by contrast, challenge the Commission's failure to acquire, through means of an enforcement action, information in the possession of a private party. Cf. *Defenders of Wildlife*, 504 U.S. at 562 ("when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotation marks omitted).

A successful FOIA action, moreover, culminates in a judicial order requiring the government to disclose the information to the plaintiff. See 5 U.S.C. 552(a)(4)(B) (district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"). Respondents' suit, by contrast, could result at most in a "declar[ation] that the dismissal of [their] complaint * * * is contrary to law," and an order "direct[ing] the Commission to conform with such declaration within 30 days." 2 U.S.C. 437g(a)(8)(C). Any order directing AIPAC to disclose its receipts and disbursements could be entered only in a separate lawsuit. See *FEC* v. *National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). And even if AIPAC were ultimately compelled to make such disclosures, the information would not be provided to respondents directly, but would be made available on equal terms to all members of the public. Cf. *Defenders of Wildlife*, 504 U.S. at 574 (plaintiff lacks standing where the requested relief "no more directly and tangibly benefits him than it does the public at large").

that the FEC's dismissal of their administrative complaint "has given AIPAC an illegal advantage in this competition." J.A. 11. Respondents' purported competitive disadvantage does not constitute Article III injury in fact, and it does not fall within the zone of interests protected by the FECA.

1. In order to satisfy the requirements of Article III, "a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute." *Raines*, 117 S. Ct. at 2317. Respondents do not allege that they have suffered pecuniary or other *personal* injury as a result of their diminished ability to influence governmental or public opinion. Rather, they allege a "diminution in their political voices—their influence in federal elections." J.A. 12. But just as "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court," *Allen* v. *Wright*, 468 U.S. 737, 754 (1984), the government's adoption (or the public's support) of policies with which respondents disagree is not enough, in and of itself, to cause them injury in fact. Cf. *Raines* v. *Byrd*, 117 S. Ct. at 2318 (Members of Congress lacked standing to sue where their "claim of standing [wa]s based on a loss of political power, not loss of any private right").[8]

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[8] Respondents have offered no basis, moreover, for concluding that AIPAC's compliance with the requirements of Sections 433 and 434 would make an "appreciable difference," *Allen* v. *Wright*, 468 U.S. at 758, in their ability to effect changes in U.S. foreign policy. Any such impact would depend entirely upon the subjective reactions of Members of Congress and of the public to the information disclosed. Because "a federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury

2. Respondents' alleged competitive injury does not fall within the zone of interests protected by the FECA generally or the Act's political committee provisions in particular.[9] Because respondents do not allege that they engage in any campaign activity—let alone that they make such efforts in support of candidates that AIPAC opposes—there is no "competition" between AIPAC and respondents in the sphere regulated by the Act.[10] The FECA's disclosure provisions

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that results from the independent action of some third party not before the court," *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42, respondents' claims would not be cognizable in federal court even if their alleged competitive disadvantage were held to constitute injury in fact.

[9] The zone-of-interests test was devised as "a gloss on the meaning of [5 U.S.C.] § 702," the judicial review provision of the APA. *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 395 (1987). This Court has applied the zone-of-interests test outside the context of APA review, while "ma[king] clear * * * that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes." *Bennett*, 117 S. Ct. at 1161 (internal quotation marks omitted). As we explain above, see page 23, *supra*, the statutory review provision under which respondents' action was brought is narrower than that in the APA: it does not authorize suits by persons "adversely affected," but only by persons "aggrieved" by the FEC's dismissal of a complaint that they have filed with the Commission.

[10] The court of appeals suggested that the Commission had conceded respondent Findley's standing as a candidate. See Pet. App. 6a & n.2. That is incorrect. Respondents did not allege that Findley had standing as a candidate or intended to run for office in the future, although they did allege that Findley was a former member of the House of Representatives. See J.A. 14. The FEC's brief to the en banc court noted the

were enacted for the purposes of educating the electorate, deterring corruption in federal elections, and detecting violations of contribution limits, see *Buckley* v. *Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam), not to aid lobbyists in gaining influence in the legislature. Compare *International Ass'n of Machinists & Aerospace Workers* v. *FEC*, 678 F.2d 1092, 1098 (D.C. Cir.) (en banc), aff'd mem., 459 U.S. 983 (1982) (under provision of the Act designed to balance electoral fundraising between labor and corporate interests, union members had standing because of alleged diminution in their unions' influence in federal *elections*).

Thus, while respondents' allegation that they "are politically active persons who * * * oppose AIPAC views on U.S. foreign policy" (J.A. 11) may differentiate them from the public at large, their asserted interest is not one that the FECA's disclosure provisions were intended to serve. Indeed, a wide range of potential plaintiffs—*e.g.*, purveyors of books or magazines focusing on the Middle East—might have a "particularized" interest in obtaining a list of AIPAC's members or donors. Such persons would not, however, be "aggrieved" by the Commission's failure to undertake an FECA enforcement action aimed at compelling disclosure of AIPAC's receipts and disbursements, because their interest in obtaining that information would not be one that the FECA was intended to protect. Respondents' suit is similarly flawed.

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absence of any allegation that respondents were candidates. FEC C.A. In Banc Br. 22.

B. Respondents' Interest As Voters Is Insufficiently Particularized To Provide A Basis For Suit

The court of appeals concluded that respondents had standing as voters, reasoning that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself." Pet. App. 12a. The court acknowledged that respondents "would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted." *Ibid.* It concluded, however, that the absence of proof on that point was not fatal to respondents' claim, explaining that whether "AIPAC made contributions in the elections in which they voted * * * is precisely the information of which [respondents] claim they have been deprived." *Id.* at 12a-13a; see also *id.* at 13a ("there is nothing to indicate that [respondents] did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee").

1. The court of appeals' analysis does not support its finding of a "particularized injury." The theory of standing articulated by the court of appeals—that respondents vote in elections in which AIPAC *may have made* contributions—would apply equally to all registered voters in the United States. That asserted injury is insufficiently concrete and personal to satisfy the requirements of Article III. Rather, the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). "[T]hat harm alone normally does not warrant exercise of jurisdiction." *Ibid.*; see *Allen* v. *Wright*, 468 U.S. at 755-756.

2. Even if respondents' alleged injuries as voters satisfied constitutional requirements, this suit should not go forward. In light of the background rule that the government's decision not to take an enforcement action against a third party is ordinarily not reviewable at all (see page 23, *supra*), Section 437g(a)(8)(A) should not be construed so broadly as to encompass a "grievance" that is shared by the entire electorate. This Court should not lightly conclude that Congress intended to include persons such as respondents as parties "aggrieved" by the Commission's dismissal of a complaint seeking to require it to bring an enforcement action against a private organization with respect to disclosure of all its receipts and disbursements.

C. Respondents' Asserted Injuries Are Not Likely To Be Redressed By A Favorable Judicial Ruling

Even if this Court were to adopt respondents' proposed construction of the Act's political committee provisions, it is far from clear that respondents would ultimately acquire the information they seek. The Commission is not required to institute a civil enforcement action in every instance in which it concludes that a violation has occurred. AIPAC has consistently argued that it is not a political committee even under respondents' proposed construction of the Act, see note 5, *supra*, and it is possible that its view would prevail in court should an enforcement action go forward. Moreover, there is no guarantee that any remedy imposed by a court, or negotiated by the Commission as part of a conciliation agreement, see 2 U.S.C. 437g(a)(4)(A)(i), would result in the disclosures respondents seek. The parties have little or no idea whether AIPAC has retained the information

sought by respondents; a monetary penalty might be deemed a sufficient remedy to forgo enforcement litigation; and the Act does not provide for judicial review of conciliation agreements. Compare 2 U.S.C. 437g(a)(5) with 2 U.S.C. 437g(a)(8)(A).

The circumstances described above—*i.e.*, the Commission's authority to exercise prosecutorial discretion; the existence of possible alternative defenses to an enforcement action; and the availability of alternative remedies if a violation is found—will be present to some degree in most suits brought under Section 437g(a)(8)(A). The circumstances of this case, however, make it particularly speculative that a ruling by this Court in respondents' favor will ultimately give them access to the information they hope to acquire. AIPAC has contended that the alleged contributions in this case involved communications to AIPAC's own members, which are specifically exempted from the statutory definition of "expenditure." See note 5, *supra*. The Commission rejected that argument and found probable cause to believe that AIPAC had violated the ban on corporate campaign expenditures and contributions set forth in 2 U.S.C. 441b. The FEC declined to take further action with respect to that finding, however, because it believed that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this." Pet. App. 98a; see note 5, *supra*. Respondents have not challenged the Commission's authority to exercise its prosecutorial discretion in that manner.

Even under the court of appeals' view of the statute, any finding that AIPAC is in violation of the FECA provisions governing political committees would depend upon the antecedent determination that the

communications at issue are properly characterized as contributions—*i.e.*, that they were sent to persons other than AIPAC's own members. That is the same determination that the Commission regarded as sufficiently close so as to warrant a decision to take no further action with respect to Section 441b.[11] Those circumstances make it especially uncertain whether the Commission would attempt to compel disclosure of all of AIPAC's receipts and disbursements, even if this Court were to affirm the court of appeals' ruling on the merits.

II. THE FEDERAL ELECTION COMMISSION DID NOT ACT IN A MANNER "CONTRARY TO LAW" IN FINDING NO PROBABLE CAUSE TO BELIEVE THAT AIPAC WAS A POLITICAL COMMITTEE UNDER 2 U.S.C. 431(4)(A) AND THEREFORE HAD VIOLATED 2 U.S.C. 433 AND 434

If this Court concludes that respondents satisfy the requirements of Article III and were "aggrieved" by the Commission's dismissal of their complaint, the

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[11] The Commission's statement of reasons in this case, issued on July 27, 1992, noted that the FEC "anticipate[d] the Commission soon will conduct a regulatory proceeding to review its membership criteria in an effort to eliminate confusion about these requirements." Pet. App. 99a. In 1993 the Commission promulgated a new regulatory definition of the term "member." See 58 Fed. Reg. 45,775 (codified at 11 C.F.R. 114.1(e)(2)). During the pendency of the appeal in this case, the D.C. Circuit held that regulation to be invalid, concluding that it defined the term "member" in an unduly restrictive fashion. See *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 604-606 (D.C. Cir. 1995). That decision casts further doubt on respondents' prospects of ultimately obtaining an order compelling disclosure of AIPAC's receipts and disbursements.

judgment of the court of appeals should be reversed on the merits. Under 2 U.S.C. 437g(a)(8)(C), respondents may prevail only if the FEC's dismissal of their complaint was "contrary to law." Because the Commission's disposition of their complaint was consistent with this Court's decisions construing the Act's political committee provisions, respondents cannot make that showing.

A. This Court's Precedents Hold That An Organization Will Be Deemed A Political Committee Under The FECA Only If The Organization's Major Purpose Is Campaign-Related Activity

The FECA defines the term "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). On its face, the statute provides no exception for organizations whose campaign-related spending, while exceeding the $1,000 threshold, is a minor part of the group's overall operation. This Court's decisions, however, have construed the Act's political committee provisions to apply only to organizations whose major purpose is campaign-related activity.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a wide range of issues concerning the interpretation and constitutionality of the FECA. In discussing the financial disclosure requirements imposed by the FECA, the Court observed that

> [t]o fulfill the purposes of the Act [the term "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79. *Buckley* involved this Court's resolution of a broad array of certified constitutional questions, see, *e.g.*, *id.* at 84 n.113, and the Court's analysis of the political committee provisions did not focus on the application of those provisions to any particular organization or pattern of spending. Rather, the Court asserted—apparently as a categorical matter—that the statutory provisions pertaining to political committees would apply only to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.[12]

2. In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court reaffirmed the "major purpose" test for status as a political committee. A plurality of the *MCFL* Court stated that "[i]n [*Buckley*] this Court said that an entity subject to

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[12] The current definition of "political committee" contained in 2 U.S.C. 431(4)(A) was reenacted without substantive change in 1980 (see Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339; compare *Buckley*, 424 U.S. at 145 (quoting prior definition)) after this Court's decision in *Buckley*. Because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), that reenactment suggests congressional acquiescence in the construction of "political committee" articulated by this Court in *Buckley*.

regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *Id.* at 252 n.6 (quoting *Buckley*, 424 U.S. at 79).

MCFL had spent nearly $10,000 in publishing a "Special Edition" of its newsletter. See 479 U.S. at 244. The Court squarely held that the "Special Edition" contained "express advocacy" of the election or defeat of identified candidates, and that the payments made to publish it were therefore independent "expenditures" within the meaning of the Act. *Id.* at 248-251. The Court nevertheless concluded that MCFL was not a political committee. The plurality stated that it was "undisputed on this record" that MCFL did not fall within the *Buckley* Court's definition of "political committee" because MCFL's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Id.* at 252 n.6; see also *id.* at 252 ("If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c), the section that prescribes the duties of '[e]very person (other than a political committee).'"). And the majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. Thus, while squarely holding that MCFL had made campaign expenditures well in excess of $1,000 during the year in question, the Court determined that MCFL was not a political committee, based on its finding that campaign-related activities were not the organization's major purpose.

3. The *Buckley* Court's articulation of the "major purpose" test could plausibly be characterized as dicta. In *MCFL*, however, the existence of a "major purpose" limitation on the Act's political committee provisions was central to the reasoning both of the four-Justice plurality opinion and of Justice O'Connor's concurrence.[13] As we explain above (see note 3, *supra*), the *MCFL* Court recognized a narrow, constitutionally based exception to Section 441b's ban on corporate campaign expenditures. In explaining the need for such an exception, the *MCFL* plurality emphasized that "[b]ecause it is incorporated, * * * MCFL must establish a 'separate segregated fund' if it wishes to engage in any independent spending whatsoever." 479 U.S. at 253. That separate segregated fund, the plurality observed, would be subject to the organizational and recordkeeping requirements that apply to political committees. *Id.* at 253-254; see 2 U.S.C. 431(4)(B) (definition of "political committee" includes "any separate segregated fund established under the provisions of section 441b(b) of this title"). The thrust of the plurality's analysis was that

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[13] In *MCFL*, moreover, the parties directly joined issue with respect to the existence of a "major purpose" limitation on the statutory definition of "political committee." MCFL argued that "[t]he definition of a political committee encompasses groups under the control of a candidate or the major purpose of which is the nomination or election of a candidate, * * * unquestionably not the case for MCFL." MCFL Br. 45 (No. 85-701) (citing *Buckley*, 424 U.S. at 79). The Commission disputed the existence of a major purpose test; relying on the "express terms" of Section 431(4)(A), the FEC argued that "MCFL's expenditure of more than $9,000 on its special election edition would make it a political committee under the terms of the statute * * * if that expenditure had been lawful." FEC Reply Br. 31-32 n.38 (No. 85-701).

MCFL, by reason of its corporate status (and consequent need to engage in campaign activity through a separate segregated fund), was subject to significant burdens to which a similarly-situated unincorporated organization would not be subject. See 479 U.S. at 252-253 ("All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to" the provisions of 2 U.S.C. 434(c), which governs persons other than political committees).

The plurality concluded that "[t]hese additional regulations may create a disincentive for such organizations to engage in political speech," 479 U.S. at 254, explaining that "while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses," *id.* at 255. The Court held that, because of the three essential features that obviated the concerns underlying Section 441b, see note 3, *supra*, imposition of those burdens upon MCFL was not supported by any compelling government interest. For that reason, Section 441b's prohibition on corporate campaign expenditures was unconstitutional as applied to MCFL. See *id.* at 256-263. Justice O'Connor's (decisive) vote was similarly based on her conclusion that the organizational requirements applicable to a separate segregated fund would pose substantial and unjustified burdens on MCFL. See *id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment).

Thus, five Justices in *MCFL* concluded that the FECA requirements applicable to political committees were sufficiently onerous to warrant a limited constitutional exemption from Section 441b's requirement that any corporate independent campaign expenditures be made through a separate segregated fund. That exemption would not, however, have alleviated the burdens associated with the establishment of a separate segregated fund if MCFL itself had been treated as a political committee. The *MCFL* Court's assertion that MCFL was not a political committee, and its reiteration of the "major purpose" test, were therefore central to the Court's disposition of the case.

B. The Commission's Finding Of No Probable Cause To Believe That AIPAC Was A Political Committee Under 2 U.S.C. 431(4)(A) Was Consistent With This Court's Decisions

In the instant case, the Commission applied the "major purpose" test and found no probable cause to believe that AIPAC had violated 2 U.S.C. 433 and 434, the organizational and reporting requirements applicable to political committees. In the report on which the Commission based its findings (see note 4, *supra*), the General Counsel

> conclude[d] that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and do[ ] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

J.A. 146; see J.A. 37-38 ("AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization."); Pet. App. 43a. Consistent with the recommendation of the General Counsel, the Commission unanimously found no probable cause to believe that AIPAC had violated Sections 433 and 434. Pet. App. 95a.[14]

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[14] As we explain above (see note 13, *supra*), the FEC's reply brief to this Court in *MCFL* disputed the existence of a major purpose test and argued that MCFL's election expenditures would have been sufficient, if lawful, to make the organization a political committee. This Court rejected that position. In recent years, the Commission has on at least two occasions (in addition to this case) articulated a major purpose test for political committee status. See Advisory Opinion (AO) 1995-11, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6148, at 12,065-12,066 (1995); AO 1994-25, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6125, at 12,001 (1994).

Two aspects of the Commission's application of the major purpose test, while not directly implicated by this case, warrant brief mention here. First, while the Court in *Buckley* defined political committees as organizations "*the* major purpose of which is the nomination or election of a candidate," 424 U.S. at 79 (emphasis added), the FEC has phrased the test as whether campaign-related activity is *a* major purpose of the organization. See AO 1995-11, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6148, at 12,065-12,066 ("the standard used is whether a major purpose of the organization is campaign activity"); AO 1994-25, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6125, at 12,001 (1994) ("the standard that has been used is whether a major purpose of the organization is to make expenditures or solicit contributions for the nomination or election of candidates"). The FEC's brief in the court of appeals in this case noted that "the Commission has said nothing that would foreclose it from finding that a large organization with more than one major purpose could qualify as a political committee." FEC C.A. In Banc Br. 42. Cf. *United States* v. *Harriss*, 347 U.S. 612, 622-623 (1954) (statute regulating persons whose "principal purpose" was to lobby Congress held applicable where lobbying was "one of the main purposes of" the person in question). Because the report on which the Commission relied concluded that "AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization," J.A. 37-38, that aspect of the "major purpose" test is not directly presented by this case.

Second, the Commission believes that an organization is a political committee if (1) electoral activity is a major purpose of the group, and (2) the group receives contributions and/or makes expenditures of more than $1,000 in a year for the purpose of influencing *federal* elections. In the FEC's view, so long as those characteristics are present, federal campaign activity need not be the group's major purpose. But see *FEC* v. *GOPAC, Inc.*, 917 F. Supp. 851, 853, 862 (D.D.C. 1996) (rejecting FEC's position and holding that "an organization is a 'political committee' under the Act if it received and/or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office"). That issue is likewise not presented by this case.

The court of appeals nevertheless concluded that "the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee." Pet. App. 29a n.13. The court based its decision on the "plain terms" of Section 431(4)(A), together with the fact that "[t]he FEC found that AIPAC likely made campaign contributions in excess of $1,000." *Id.* at 29a. The court suggested two alternative bases for its conclusion that AIPAC should be treated as a political committee.

First, the court suggested that the "major purpose" test might appropriately be used simply as a means of determining whether a particular disbursement is an "expenditure" counting towards the $1,000 statutory threshold. See Pet. App. 26a (suggesting that "it is the purpose of the organization's disburse-

ments, not of the organization itself, that is relevant"); see also Br. in Opp. 2 (characterizing the "major purpose" test as "a criterion for determining *whether* an activity undertaken *independently* of a candidate *is* an election 'expenditure'"). On that theory, an organization that makes campaign expenditures (defined as disbursements whose major purpose is to influence federal elections) aggregating more than $1,000 per year is, *ipso facto*, a political committee, regardless of the substantiality of campaign activity in comparison to the group's overall operation. See Br. in Opp. 4 n.3. Second, the court of appeals noted that this Court in *Buckley* "clearly distinguished independent expenditures and contributions as to their constitutional significance." Pet. App. 24a. Although an organization making more than $1,000 in independent expenditures might not be a political committee if campaign activities were not its major purpose, the court held, an organization making more than $1,000 in contributions will always be a political committee. See *id.* at 24a-25a. Neither of those theories is consistent with this Court's precedents.

1. The "major purpose" test, as articulated in *Buckley* and *MCFL*, focuses unambiguously on the purpose of the organization, not on the purpose of a particular disbursement. In *Buckley* this Court stated that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). Grammatically, the word "organizations" is the only possible antecedent for the phrase "of which." The ensuing pages of the *Buckley* opinion addressed the term "expenditure" as it applies to independent expenditures made by individuals and by groups other than political committees. See *id.* at 79-82. The Court construed the term in that context as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted). The Court did not suggest that it was articulating two different tests for an independent expenditure—*i.e.*, one employing the "express advocacy" requirement when applied to individuals and to groups other than political committees, and another employing the "major purpose" test to identify those disbursements counting towards the $1,000 threshold for political committee status. Indeed, respondents have never identified any reason for the Court to have formulated alternative tests for defining independent expenditures.[15]

This Court's subsequent decision in *MCFL* makes it particularly clear that the relevant inquiry focuses on the organization's major purpose, not on the major

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[15] After this Court's decision in *Buckley*, moreover, Congress amended the FECA to define "independent expenditures" as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17); see H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976) (the term "independent expenditures" is "defined in the [1976 amendments] in conformity with the *Buckley* Court's definition"). That statutory amendment further undermines respondents' contention that the "major purpose" test should be used to define independent expenditures counting against the $1,000 threshold for political committee status.

purpose of an individual disbursement. Although MCFL had spent nearly $10,000 publishing a newsletter that contained "express advocacy" of the election or defeat of identified candidates (see 479 U.S. at 244, 248-251; page 34, *supra*), the plurality deemed it "undisputed" that MCFL did not meet *Buckley*'s definition of "political committee" because "[i]ts central organizational purpose [wa]s issue advocacy," 479 U.S. at 252 n.6. The majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. *MCFL* makes clear that it is "the organization's major purpose," *ibid.*—not the major purpose of any particular disbursement—that is dispositive of the "political committee" inquiry.

Moreover, a test focusing on the major purpose of a particular disbursement would not satisfactorily address the practical and constitutional problems potentially created by the Act's political committee provisions. A political committee is required to make comprehensive disclosures of *all* of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v). There is consequently a significant danger that campaign-related expenditures by an organization that are but a small percentage of the organization's overall disbursements may trigger a far-reaching obligation to disclose *all* non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. See pages 44-45, *infra*. A narrowing construction of the term "expenditure" alone would not alleviate that risk.

2. The court of appeals' primary rationale was its determination that the practical and constitutional concerns underlying the "major purpose" test are implicated only when the disbursements that exceed the $1,000 statutory threshold are independent expenditures rather than direct contributions or coordinated expenditures. See Pet. App. 24a-25a; see also *id.* at 20a, 29a. That premise is incorrect.

The Court in *Buckley* recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64; see also, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). The *Buckley* Court concluded that, as a general matter, the Act's disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68. The Court remained concerned, however, about the potential impact of the disclosure provisions upon groups and individuals "engaged purely in issue discussion." *Id.* at 79.

The Court addressed that concern in two distinct ways. With respect to independent expenditures by individuals and groups other than political committees, the Court construed the term "expenditure" as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted). The Court observed that "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal

candidate." *Ibid.* So construed, the Court held, "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

The disclosure requirements applicable to political committees, however, raise distinct concerns. Because of their particular importance in election campaigns, political committees are required to file regular reports of *all* of their receipts and disbursements, including those pertaining to issue advocacy not directly related to election campaigns. As applied to an organization whose campaign-related spending constitutes a small percentage of the overall operation, the Act's disclosure requirements could place substantial burdens on core First Amendment activities while contributing only slightly to the achievement of the statutory purposes. The *Buckley* Court addressed that danger by construing the term "political committee" as limited to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Because the receipts and disbursements of such organizations "are, by definition, campaign related," *ibid.*, application of the Act's broad disclosure requirements to "political committees" so defined can be expected to have little impact on non-campaign-related speech. The Court thus concluded that the purposes of both the Act and the First Amendment are properly served by construing the Act to require a group whose major purpose is campaign-related activity to report all of its receipts and disbursements, but not to impose such a broad reporting requirement (and attendant burdening of associational interests) on issue advocacy groups for whom

election expenditures are but a small percentage of their overall activities.

Thus, the limiting construction given to the statutory term "political committee" in *Buckley* serves to address the danger that relatively small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose the much broader category of non-campaign-related receipts and disbursements that are its primary activity, including receipts and disbursements used for issue advocacy. As the panel in this case correctly recognized (see Pet. App. 55a), that danger is equally present whether the triggering disbursements are independent expenditures or direct contributions.[16] The en banc court was therefore wrong in

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[16] As the en banc court of appeals correctly observed (see Pet. App. 21a-22a), this Court has recognized a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). That constitutional difference, however, is largely irrelevant to the basis for and proper application of the "major purpose" test. As applied to organizations that make independent expenditures, the point of the "major purpose" test is not to prevent application of the FECA's disclosure provisions to the independent expenditures themselves. To the contrary, the *Buckley* Court made clear that reporting of independent expenditures may constitutionally be required, even where the expenditure is made by a person other than a political committee. 424 U.S. at 80-82; see 2 U.S.C. 434(c) (persons other than political committees that make independent expenditures aggregating more than $250 must file disclosure reports). Rather, the "major purpose" test is designed to shield organizations that only occasionally make campaign-related expenditures from compelled disclosure of the *other* associational and communicative activities, unrelated

concluding (see *id.* at 24a) that the concerns underlying the *Buckley* Court's narrowing construction of "political committee" are inapplicable to organizations that make more than $1,000 per year in direct contributions or coordinated expenditures.[17]

3. The en banc court of appeals also criticized the Commission's approach on the ground that

> [t]he FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.

Pet. App. 27a. That distinction is inherent in *Buckley*'s "major purpose" test, however, and the court of appeals' analysis does not eliminate the supposed anomaly. As we explain above, the court of appeals' primary rationale was that the "major purpose" test should apply only where a group's disbursements exceeding the $1,000 threshold are independent expenditures rather than contributions or coordinated expenditures. Even under that approach, "an organization spending its entire $1 million budget on [independent expenditures] would be a political committee, while another organization spending $1 million of its $100 million budget on [independent expenditures] would not." *Ibid.* The court of appeals did not explain why that disparity is acceptable in the context of groups making independent expenditures, but "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee'" (*ibid.*) when applied to groups making contributions or coordinated expenditures.

Any apparent anomaly disappears, moreover, once the justification for the *Buckley* Court's narrowing construction is understood. As we have explained, that construction addresses the danger that an organization might be subject to comprehensive disclo-

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to electoral campaigns, that are their primary enterprise. Application of the FECA's disclosure requirements to *those* organizations remains problematic regardless of the nature of the campaign activities that triggered the reporting requirements in the first instance.

[17] The court of appeals' decision has broad ramifications for issue-oriented, lobbying, and charitable groups that only occasionally make election expenditures. Although the court of appeals acknowledged that, "[o]nce designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200," Pet. App. 3a, the court made no effort to address the concerns that arise from applying those requirements to every group that has made contributions or coordinated expenditures exceeding $1,000 in a year.

Because corporations and labor unions are prohibited from making campaign contributions except through a separate segregated fund (see 2 U.S.C. 441b; page 7, *supra*), the court of appeals' decision has no effect on the range of lawful options available to those entities. At least in theory, however, the court's decision creates the possibility that a corporation or union making (illegal) contributions aggregating more than $1,000 in a year could be required to disclose all of its receipts and disbursements, including receipts and disbursements wholly unrelated to election campaigns, in addition to being subject to penalties for its violation of Section 441b.

sure requirements with respect to extensive non-campaign-related receipts and disbursements based on its relatively insignificant involvement in campaign activity. The hypothetical "organization spending its entire $1 million budget on campaign activity" (Pet. App. 27a), however, *has* no non-campaign-related receipts or disbursements. To treat such an organization differently from an organization that spends only 1% of its funds ("$1 million of its $100 million budget") on campaign activity is in no way anomalous. That disparity simply reflects the fact that the *Buckley* Court's concern—that the FECA's disclosure requirements might have the effect of unnecessarily burdening the non-campaign-related speech of an organization that only occasionally makes election expenditures—is implicated in one situation but not in the other.

Application of the "political committee" provisions to groups that only occasionally engage in campaign activity is unnecessary to ensure that significant contributions and independent expenditures are exposed to public view. Even if groups like AIPAC are not political committees, their campaign-related activity is nevertheless subject to reporting requirements. See page 4, *supra*. Such groups must file disclosure reports if they make independent expenditures aggregating more than $250 in a calendar year. 2 U.S.C. 434(c); see *MCFL*, 479 U.S. at 252-253 (plurality opinion). The Act also requires that contributions aggregating more than $200 from such groups to a candidate or political committee must be reported by the recipient. 2 U.S.C. 434(b)(3). To require groups that are minimally involved in campaign-related activity to report *all* of their receipts

and disbursements is thus unnecessary to effectuate the purposes of the Act.[18]

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[18] This Court has recognized that the Federal Election Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); see also *id.* at 39 ("[I]n determining whether the Commission's action was contrary to law, the task for the [court] [i]s not to interpret the statute as it th[inks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted by a reviewing court.") (internal quotation marks omitted). The court of appeals nevertheless declined to give deference to the Commission's position here, stating that it was "not obliged to defer to an agency's interpretation of Supreme Court precedent." Pet. App. 19a. That reasoning was flawed.

Although the court of appeals characterized its task as the "interpretation of Supreme Court precedent," the court did not suggest that either *Buckley* or *MCFL* had declared the "major purpose" test to be inapplicable to groups making direct contributions. Rather, the court concluded that application of the Act's "political committee" provisions to such groups would not raise the concerns identified by the *Buckley* Court as the justification for the "major purpose" test. See Pet. App. 19a. To the extent that the Court's construction of a statutory term leaves open additional questions about the application of the provision, the policies supporting deference to an agency's expert resolution of those questions remain applicable. That is especially so where (as here) the choice between two methods of construing the statute rests in part on the evaluation of policy concerns—*e.g.*, the extent to which other FECA provisions will ensure adequate public scrutiny of campaign-related activity—as to which the Commission possesses special expertise.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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